UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA PRO-LIFE COUNCIL, INC.,

Plaintiff,

v.

LIANE RANDOLPH, in her official capacity as Chairman of the Fair Political Practices Commission, et al.,

Defendants.

NO. CIV S-00-1698 FCD GGH

MEMORANDUM AND ORDER

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This matter arises out of plaintiff California Pro-Life Council, Inc.'s ("CPLC") motion for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. Plaintiff seeks a total of $706,367.08 for lead counsel's attorneys' fees and $26,197.24 for costs associated with the litigation in this case incurred by lead counsel. Plaintiff also seeks attorneys' fees and costs for local counsel. Defendants contend that the requested award should be substantially reduced based upon the rates charged, the

costs of appeal, and the degree of success obtained by plaintiff. For the reasons set forth below,[1] plaintiff's motion is GRANTED in part and DENIED in part.

BACKGROUND

Litigation in this matter has been ongoing for over eight years. On August 8, 2000, CPLC filed its initial complaint with this court. The essence of CPLC's operative ten-count complaint ("complaint") is that Cal. Gov't Code §§ 82031 and 82013(a) and (b) Cal. Code Regs. tit. 2, §§ 18225(b) and 18215(b), violate CPLC's First and Fourteenth Amendment rights by subjecting them to onerous reporting requirements for engaging in express advocacy of ballot measures. Three of these claims were dismissed by stipulation of the parties. By orders filed on October 24, 2000 and January 22, 2002, this court dismissed the remainder of plaintiff's claims on various grounds.

The Ninth Circuit affirmed this court's dismissal of Counts 1 and 3, holding that CPLC "does not have standing to argue that the definition of 'independent expenditure' is unconstitutionally vague as applied to its candidate advocacy." California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1096 (9th Cir. 2003). With respect to Counts 5 and 10, the court held that CPLC could challenge the allegedly vague definition of "independent expenditure" as it related to CPLC's express ballot measure advocacy, but concluded that the definition, as narrowly defined by the California appellate court in Governor Gray Davis

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[1] Because oral argument will not be of material assistance, the court orders these matters submitted on the briefs. E.D. Cal. Local Rule 78-230(h).

Committee v. American Taxpayer Alliance, 102 Cal. App. 4th 449 (2002), was not unconstitutionally vague. Getman, 328 F.3d at 1093, 1100. Lastly, the Ninth Circuit addressed Counts 2, 4, and 6, "CPLC's more general challenge to the PRA's regulation of ballot measure advocacy." Id. at 1100. The court concluded that the PRA's disclosure provisions burden protected First Amendment speech and therefore, must satisfy strict scrutiny. The Circuit court remanded, stating that it was for this court to determine in the first instance whether the state's interest was in fact compelling, and whether the challenged PRA provisions were narrowly tailored to advance that interest. Id. at 1107.

On remand, the parties filed cross-motions for summary judgment. By order dated February 25, 2005, this court denied CPLC's motions for summary judgment and granted defendants' motion for summary judgment. The Court held that (1) California has a compelling information interest in the PRA's disclosure provisions; and (2) the record-keeping, reporting, and organizational obligations were narrowly tailored to that compelling interest. CPLC appealed the judgment.

On November 14, 2007, the Ninth Circuit affirmed in part, reversed in part, and remanded. California Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172 (9th Cir. 2007). The Ninth Circuit concluded that defendants had met their burden of demonstrating (1) a compelling interest in the disclosure of funding sources for express ballot measure advocacy; and (2) that the definition of "contribution" is narrowly tailored to that compelling interest. Id. at 1183-87. However, the Ninth Circuit held that defendants failed to demonstrate that the PRA's

imposition of the "full panoply of regulations that accompany status as a political committee under the Act," which included mandated registration, formal termination procedures, periodic reporting, and heightened recordkeeping requirements, on a group like CPLC were narrowly tailored to that same interest. Id. at 1187-89. As such, the Ninth Circuit's held that CPLC, and groups like CPLC, cannot be required to comply with political committee-like requirements beyond disclosure of the identities of persons funding independent expenditures made by CPLC to support or oppose qualification or passage of ballot measures. Randolph, 507 F.3d at 1187-90.

Consistent with the Ninth Circuit's decisions, by order filed March 12, 2008, this court held that CPLC was entitled to judgment in its favor on Count Six and permanently enjoined defendant from enforcing additional political committee-like requirements against CPLC and groups like CPLC. (Mem. And Order [Docket # 204], filed Mar. 12, 2008, at 7.) As such, nine of plaintiff's original ten claims for relief were ultimately dismissed. (See id. at 5-7.) However, plaintiff was successful in obtaining declaratory and injunctive relief on one of its claims.

STANDARD

The Civil Rights Attorneys' Fees Awards Act of 1976 states in relevant part:

> In any action or proceeding to enforce a provision of . . . [42 U.S.C. § 1983] . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988(b) (West 2008). "Section 1988 was enacted to insure that private citizens have a meaningful opportunity to vindicate their rights protected by the Civil Rights Acts." Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 559 (1986) (citing Hensley v. Eckhart, 461 U.S. 424, 429 (1983). As such, a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[2] Hensley, 461 U.S. at 429 (internal quotations omitted). District courts are given discretion in calculating the amount of attorneys' fees. Id. at 437. However, the district court must make clear its reasons for a certain fee award, especially "when an adjustment is requested on the basis of either the exceptional or limited nature of relief obtained by the plaintiff." Id.

The party seeking fees bears the burden of documenting and substantiating fees, and those fees must be reasonable and necessary to the litigation. Id. at 434. In determining the award, courts typically use the "lodestar" method to calculate attorneys' fees. Widrig v. Apfel, 140 F.3d 1207, 1209 (9th Cir. 1998). Under this method, the court multiplies the number of hours reasonably expended on the litigation by a reasonable hourly rate. Hensley, 461 U.S. at 433 ("This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services."). The district court should exclude from this initial calculation hours that it deems were not reasonably expended. Id. at 434.

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[2] Defendants do not dispute that plaintiff is a prevailing party in this litigation.

There is a strong presumption that the lodestar amount is reasonable, though the court may adjust the lodestar figure if various factors overcome that presumption of reasonableness. Fischer v. SJB-P.D, Inc., 214 F.3d 1115, 1119 (9th Cir. 2000). The following twelve factors are generally used to adjust a fee award:

> (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the 'undesirability' of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975); E.D. Cal. L.R. 54-293. The factor of "results obtained" is "particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." Hensley, 461 U.S. at 434.

ANALYSIS

A. Reasonable Hourly Rates

Generally, a reasonable hourly rate is set based on the prevailing market rates in the legal community of the forum district. Blum v. Stenson, 465 U.S. 866, 895 (1984); Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1993). The fee applicant bears the burden of producing evidence that the requested rate is commensurate with the rates in the community for similar services by attorneys of "reasonably comparable skill, experience and reputation." Blum, 465 U.S. at 895 n. 11;

Trevino v. Gates, 99 F.3d 911, 924-25 (9th Cir. 1996); Davis v. City of San Francisco, 976 F.2d 1536, 1545 (9th Cir. 1992)(a reasonable hourly rate should be determined "by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity"). Determination of a reasonable hourly rate is not made merely by reference to rates actually charged by the prevailing party or rates charged in the prevailing party's locale. See White v. City of Richmond, 713 F.2d 458, 461 (9th Cir. 1983). Rather, the rate assessed is based on the prevailing rate in the relevant community *for similar work*. Chalmers, 796 F.2d at 1211; Blum, 465 U.S. at 895 n. 11. Generally, the relevant community is the forum in which the district court sits. Davis v. Mason County, 927 F.2d 1473, 1488 (9th Cir. 1991). However, rates outside the forum may be used "if local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case." Gates v. Deukmejian, 987 F.2d 1392, 1405 (9th Cir. 1992).

The law firm of Bopp, Coleson & Bostrom served as lead counsel for plaintiff. (Decl. of James Bopp, Jr. ("Bopp Decl.") [Docket #208], filed Apr. 11, 2008, ¶ 24.) Plaintiff seek the following fee rates for lead counsel's work in this case:

James Bopp, Jr.	$385 per hour
Barry A. Bostrom	$325 per hour
Richard E. Coleson	$325 per hour

Glenn M. Willard	$325 per hour
Eric C. Bohnet	$290 per hour
Heidi K. Abegg	$290 per hour
James R. Mason	$290 per hour
B. Chad Bungard	$275 per hour
Raeanna S. Moore	$275 per hour
J. Aaron Kirkpatrick	$265 per hour
Justin David Bristol	$265 per hour
Benjamin T. Barr	$265 per hour
Jeffrey P. Gallant	$265 per hour
Clayton J. Callen	$190 per hour[3]

The principal attorneys assigned to the case were Richard E. Coleson ("Coleson") and B. Chad Bungard ("Bungard"). (Id. ¶ 24.) However, in order to complete the work required for this case, projects were divided among several attorneys. (Id.)

James Sweeney ("Sweeney") and Tahnya Ballard ("Ballard") served as local counsel. (Decl. of James F. Sweeney in Supp. of Mot. for Attorneys' Fees ("Sweeney Decl.") [Docket #212], filed Apr. 14, 2008, ¶ 1; Decl. of Tahnya Ballard ("Ballard Decl.") [Docket #210], filed Apr. 11, 2008, ¶ 3.) Local counsel seeks the following fee rates:

James F. Sweeney	$375 per hour
Tahnya Ballard	$250 per hour

(Sweeney Decl. ¶ 9; Ballard Decl. ¶ 8.)

[3] While the Bopp declaration asserts that Callen's rate in the local market would be $195 per hour, the actual rate charged for his work in the breakdown submitted to the court is $190 per hour. (Ex. C to Bopp Decl.)

In support of their requested fee rates, plaintiff submit the declaration of Charles H. Bell, Jr. ("Bell"), a senior partner in the law firm of Bell, McAndrews, Hiltachk,& Davidian LLP, a law firm which practices in Sacramento and specializes in campaign, election, and administrative law at all levels of government. (Decl. of Charles H. Bell, Jr. ("Bell Decl.") [Docket #209], filed Apr. 11, 2008, ¶¶ 4, 5.) Bell asserts that his law firm uses the following rate table, which has been established in light of prevailing rates within the Sacramento metropolitan area:

Associates: 1-3 years	$150-$170 per hour
Associates: 3+ years	$170-$230 per hour
Partners: to 10 years	$230-$260 per hour
Partners: 10+ years	$260-$280 per hour
Senior Partners:	$280-$400 per hour
Law Clerks:	$100-310 per hour

(Id. ¶ 6.) The actual rate ascribed to an attorney within the appropriate range depends on his personal level of expertise in the subject area and the arena in which the services are being rendered. (Id.) Bell also asserts that he has reviewed the declarations regarding plaintiff's' counsel's work in this case, and it is his opinion that the rates charged are fair and reasonable in light of the local market. (Id. ¶ 7.)

1. Bopp and Ballard's Requested Rates

Defendants do not challenge the requested hourly rate of James Bopp, Jr. ("Bopp"), stating that it is within the range of applicable community rates set forth by Bell in his declaration. (Def.'s Opp'n to Pls.' Mot. for Attorney's Fees and Expenses

("Opp'n") [Docket #215], filed May 7, 2008, at 17 n.14.) Defendants also do not challenge the requested hourly rate of Ballard. (Id. at 17 n.15.) Having reviewed the submissions of the parties and the relevant case law, the court finds that the fee rates of $385 per hour for Bopp and of $250 per hour for Ballard are reasonable.

2. Sweeney's Requested Rate

Defendants contend that Sweeney's hourly rate should be reduced to $250 per hour because it is the rate claimed by current local counsel, Ballard, and because it has repeatedly been found to be a reasonable rate for an experienced attorney in Sacramento. (Id.) With its reply,[4] plaintiff submits a supplemental declaration of Bell, which provides that attorneys with Sweeney's level of experience, knowledge, background, and expertise routinely receive between $350 and $400 per hour. (Supplemental Decl. of Charles H. Bell in Supp. of Pls.' Mot. for Attorneys' Fees ("Suppl. Bell. Decl.") [Docket #220], filed May 16, 2008, ¶ 11; see also Sweeney Decl. ¶¶ 2-7.) Moreover, this rate is within the range of applicable community rates set forth by Bell in his original declaration, which defendants implicitly concede are appropriate. (See Opp'n at 16-18) (applying the rates set forth in the Bell declaration in order to arrive at proposed alternative reasonable rates). While defendants assert that there was no evidence submitted in plaintiff's moving papers regarding the reasonable rate for a sole practitioner or member of a small law partnership in Sacramento, defendants also fail to

[4] Defendants did not raise any objection to the court's consideration of this evidence.

proffer any evidence or argument that an attorneys' hourly rate should be adjusted because he is affiliated with a small law firm. Rather, the supplemental Bell declaration, in conjunction with the Sweeney declaration, support plaintiff's contention that $375 per hour is a reasonable fee rate for Sweeney's work in this litigation.

3. Compensation at Current Experience Levels

While defendants do not oppose the application of current community rates, defendants argue that plaintiff's requested rates for the remainder of counsel are unreasonable because plaintiff is requesting that such counsel be compensated based on their current experience level, as opposed to their experience level when they were working on the case as long as seven to nine years ago. Defendants contend that this method of calculation results in a "windfall" to plaintiff. (Opp'n at 16 n.12.) Plaintiff argues that such a methodology does not result in a windfall, but rather accounts for both inflation and loss of the use of funds.

The Supreme Court and the Ninth Circuit have established that it is within the district court's discretion "to compensate prevailing parties for any delay in the receipt of fees by awarding fees at current rather than historic rates in order to adjust for inflation and the loss of funds." Gates, 987 F.2d at 1406 (collecting cases) (emphasis added); see also Missouri v. Jenkins, 491 U.S. 274, 283-84 (1989); Barjon v. Dalton, 132 F.3d 496, 502-03 (9th Cir. 1997) ("[T]he district court may choose to apply either the attorney's current rates to all hours billed or the attorney's historic rates plus interest."); In re Washington

Pub. Power Supply Sys. Sec. Litig., 19 F.3d 1291, 1305 (9th Cir. 1994) ("Full compensation requires charging current rates for all work done during the litigation, or by using historical rates enhanced by an interest factor."). The Supreme Court has reasoned that an appropriate adjustment for delay in payment was within the contemplation of § 1988 because "compensation received several years after the services were rendered . . . is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed." Jenkins, 491 U.S. at 384 (approving an adjustment "whether by the application of current rather than historic hourly rates or otherwise"). Subsequently, the Ninth Circuit has noted that "[a] fee award at current rates is intended to compensate prevailing attorneys *for lost income* they might have received through missed investment opportunities *as well as lost interest*." Gates, 987 F.2d at 1406.

While it is well established that an adjustment to fees should account for both inflation and lost interest, the Ninth Circuit has also observed that "[a] court may . . . refuse to use current hourly rates on the grounds that increased rates reflect the attorney's increased knowledge and experience, not merely inflation." Burgess v. Premier Corp., 727 F.2d 826, 841 (9th Cir. 1984). Therefore, it is within the district's court discretion to adjust the attorneys' fee award in order to compensate for both inflation and lost interest, but such adjustment should not compensate for an attorney's increased skills gained through experience.

A review of the relevant cases cited by plaintiff and found by the court, however, reveals an ambiguity with respect to the

Ninth Circuit's definition of current rates. It is unclear whether "current rates" refers (1) to rates currently charged in the relevant community for attorneys of the same experience level that the fee-seeking attorneys were when they worked on the litigation; or (2) to rates currently charged in the relevant community for attorneys of the experience level that the fee-seeking attorneys currently are at the time they are seeking the fees.

Paying counsel at current values based on their experience level when they performed the work would compensate for inflation. See Bouman v. Block, 940 F.2d 1211, 1235 (9th Cir. 1991); see also Miller v. Holzmann, -- F. Supp. 2d --, Civ No. 95-1231, 2008 WL 3319032, at *13 (D.D.C. Aug. 12, 2008.) However, it does not take into account the lost interest or economic opportunities missed over the last eight years that this case was litigated by lead counsel on a contingency fee basis. (See Bopp Decl. ¶ 21.) Yet, paying counsel at the current rates for their current experience levels would produce a windfall to plaintiff's counsel by adjusting fees for an attorney's increased skills gained through experience. Leroy v. Houston, 831 F.2d 576, 584-85 (9th Cir. 1987); Chalmers v. City of Los Angeles, 676 F. Supp. 1515, 1526 (C.D. Cal. 1987) ("An increase in an attorney's hourly rate over time more likely reflects an attorneys [sic] increased experience and skill as a lawyer than some change in the time-value of money."); see Burgess, 727 F.2d

at 841. Contra Miller, 2008 WL 3319032, at *13.[5] The court finds that the application of a multiplier to account for lost interest over the course of litigation will more accurately reflect the proper amount of fees. See Chalmers, 676 F. Supp. at 1527 ("The historic market rate of interest . . . is a more relevant factor in measuring loss from delay.").

Therefore, the court will apply the rates currently charged in the relevant community for attorneys of the same experience level that the fee-seeking attorneys were when they worked on the litigation. At the conclusion of the lodestar calculation, the court will increase the total fees by a multiplier of 1.15 to account for lost interest and opportunities incurred over the course of the eight year litigation.[6]

4. Approved Reasonable Rates

Defendants also argue that plaintiff's requested rates are unreasonable because they are not in line with those set forth in the Bell declaration. The court agrees.

The court finds that the range of rates set forth in the Bell declaration are the prevailing rates in Sacramento for similar work by attorneys of reasonably comparable skill,

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[5] Such a windfall is exemplified in this case where a large part of the work was performed from 1999 to 2001 by B. Chad Bungart, an associate admitted to the bar in 1999. Plaintiff contends that Bungard should be paid at the rate of $275 per hour, instead of $170 per hour, the high end of the range for a 1-3 year associate under the Bell declaration. This increase overcompensates for lost interest occasioned by the length of litigation.

[6] The court finds that a 15% increase is reasonable to account for lost interest and opportunities during the course of the litigation under the facts of this case. However, the court does not apply the multiplier to the fees and costs incurred relating to the motion for attorneys' fees. (Exhibit B.)

experience and reputation.[7] The court acknowledges the complexity of the issues raised in this case, the requisite skill required to perform the legal services, and the experience, reputation and ability of the attorneys; thus, the court applies the rates at the high end of the applicable range.

In determining the applicable range, the court looks to the date when counsel was admitted to the bar and assumes that such admission was at the beginning of that year. For example, applying the rate table set forth in the Bell declaration, an associate admitted to the bar in 1999 would be compensated at the rate of $170 per hour for work performed between 1999 through 2001. For any work performed from 2001 through 2008, that associate would be compensated at the rate of $230 per hour. Further, while, aside from Bopp, there are no "partners" at the law firm of Bopp, Coleson & Bostrom, the court looks to the billing rates for partners with ten or more years of experience when assessing the rates of "Senior Associates" Richard E. Coleson and Barry A Bostrom. (See Bopp Decl. ¶ 13) ("[A]ttorneys with partner-level experience have the tile of Senior Associate with my firm.").

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[7] The court does not consider the Altman Weil statewide survey submitted by plaintiff because this reflects statewide billing rates, not the prevailing billing rates in Sacramento. See Petroleum Sales, Inc. v. Valero Ref. Co., No. C. 05-3526, 2007 WL 2694207, at *5 (N.D. Cal. Sept. 11, 2007) (rejecting consideration of the Altman Weil survey because it is "too broad"); S.W. Ctr. for Biological Diversity v. Bartel, No. 98-CV-2234, 2007 WL 2506605, at *4 (S.D. Cal. Aug. 30, 2007) (rejecting fee schedule set forth in Altman Weil survey because it averages rates over a large region); Grunseich v. Barnhart, 439 F. Supp. 2d 1032, 1034 (C.D. Cal. 2006) (rejecting reliance on Altman Weil survey).

As such, and for the reasons set forth above, the court finds that the following rates are reasonable for all counsel in this case:

James Bopp, Jr.	$385 per hour
Barry A. Bostrom	$280 per hour
Richard E. Coleson	$280 per hour
Glenn M. Willard	$230 per hour
Eric C. Bohnet	$230 per hour
Heidi K. Abegg	$230 per hour
James R. Mason	$230 per hour
B. Chad Bungard	$170 per hour
Raeanna S. Moore	$170 per hour (1999) $230 per hour (2000-2008)
J. Aaron Kirkpatrick	$170 per hour
Justin David Bristol	$170 per hour
Benjamin T. Barr	$170 per hour
Jeffrey P. Gallant	$170 per hour (2001-2003) $230 per hour (2004-2008)
Clayton J. Callen	$170 per hour
James F. Sweeney	$375 per hour
Tahnya Ballard	$250 per hour

B. Costs on Appeal

In both remand orders, the Ninth Circuit ordered that "[e]ach party is to bear its costs on appeal." Randolph, 507 F.3d at 1190; Getman, 328 F.3d at 1107 ("Each party shall bear its own costs on appeal."). As such, defendants contend that plaintiff's requested fees should be reduced because it is not entitled to costs on appeal. Specifically, defendants assert that, under the plain language of § 1988, "costs" include

attorneys' fees attributable to the appeal and are thus precluded by the Ninth Circuit's orders. Plaintiff contends that costs refers only to the costs set forth in Rule 39 of the Federal Rules of Appellate Procedure.

Rule 39(a) sets forth the rules regarding parties against whom costs may be assessed unless the law or court orders provide otherwise. In ordering that each party was to bear its own costs on appeal, the Ninth Circuit was excising its discretion pursuant to Rule 39(a). Section 1988(b) provides, in relevant part:

> In any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, . . . *a reasonable attorney's fee as part of the costs* . . . .

42 U.S.C. § 1988(b) (emphasis added). The Ninth Circuit has not directly addressed the relationship between costs under Rule 39 and attorneys' fees under section 1988. Specifically, the Ninth Circuit has not addressed whether "costs" on appeal includes attorneys' fees under § 1988.

The Ninth Circuit has recently held that Rule 39 was not intended "to create a uniform definition of 'costs,' exclusive of attorneys' fees." Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 958 (2007); see Adsani v. Miller, 139 F.3d 67, 75 (2d Cir. 1998) ("Rule 39 has no definition of the term "costs" but rather defines the circumstances under which costs should be awared."); see also Pedraza v. United Guar. Corp., 313 F.3d 1323, 1329-30 (11th Cir. 2002) ("Under no fair reading of the simple, unambiguous language of Rule 39 can an exportable definition of 'costs' be perceived . . . ."). But see McDonald v. McCarthy, 966 F.2d 112, 116 (3d Cir. 1992) ("Rule 39 . . . is not silent as

to the definition of costs."); Robinson v. Kimbrough, 652 F.2d 458, 463 (5th Cir. 1981) ("Rule 39 . . . refers only to the usual costs of appeal."). In Azizian, the Ninth Circuit was confronted with the issue of whether "costs on appeal," as used in Federal Rule of Appellate Procedure 7, included all expenses defined as "costs" by an applicable fee-shifting statute, including attorneys' fees. Id. at 953. The applicable fee-shifting statute before the court was Section 4 of the Clayton Act, which provides that an injured party shall recover "cost of suit, including a reasonable attorney's fee." Id. at 959. The court found that neither Rule 7 nor Rule 39 provided an exclusive definition of costs. Id. at 958. In particular, the Azizian court noted that Rule 7 was silent with respect to the definition of costs and that "[t]he discrepancy between the use of the term 'costs' in Rule 39 and its use in Rule 38 strongly suggests that the rules' drafters did not intend for Rule 39 to create a uniform definition . . . ." Id. Further, the court read the language of 39(e) to mean that "the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal." As such, the court held that because there was no exclusive definition of costs in the Rules and because the plain language of the applicable fee-shifting statute included reasonable attorneys' fees as part of "costs," the term "cost" in Rule 7 included attorneys' fees if such fees were eligible to be recovered. Id. at 959-960 (determining that appellant did not need to secure a bond for attorneys' fees because appellee was not eligible to recover such fees under the statute).

Where an applicable rule does not define the term "costs" and the underlying fee-shifting statute does, the court must rely upon the definition set forth in the statute. Marek v. Chesny, 473 U.S. 1, 8-9 (1985). In Marek, the Supreme Court held that the term "costs" in Federal Rule of Civil Procedure 68 includes attorneys' fees under § 1988. Id. at 9. The Court reasoned that by not defining the term "costs" in Rule 68, the drafters "intended to refer to all costs properly awardable under the relevant substantive statute or other authority." Id. The Court also noted that "Congress *expressly* included attorney's fees as 'costs' available to a plaintiff in a § 1983 suit." Id. "Thus, absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees," the Supreme Court concluded that such fees are to be included as costs for purposes of a rule that does not explicitly define that term. Id.

In this case, the Ninth Circuit ordered that each party shall bear their own costs on appeal pursuant to Rule 39. The Ninth Circuit did not define what they meant by costs. Further, as set forth above, Rule 39 does not set forth a uniform definition of costs nor a definition of costs that is exclusive of attorneys' fees. Azizian, 499 F.3d at 958. Thus, the court must look to the underlying fee-shifting statute. Marek, 499 U.S. at 9. As the Supreme Court noted in Marek, the plain language of § 1988 demonstrates Congress' intent to include attorneys' fees as part of the costs of suit. Id. Therefore, the Ninth Circuit's order pursuant to Rule 39 that each party shall bear its own costs on appeal includes attorneys' fees under

§ 1988. As such, plaintiff may not seek attorneys' fees incurred in the process its appeals.

In its reply, plaintiff cites to the Third Circuit's decision in McDonald v. McCarthy, which held that an award of attorneys' fees was not precluded by the Court of Appeals' order that each party bear its own costs on appeal. 966 F.2d at 118. The McDonald court based its analysis on its finding that "Rule 39 defines costs as including normal administrative costs" and does not provide "for the assessment of attorneys' fees." Id. The court distinguished the Supreme Court's decision in Marek on the basis that, unlike Rule 39, Rule 68 did not have a definition of costs. Id. at 116. Rather, the Third Circuit found that the issue before it was more akin to that before the Supreme Court in Roadway Express, Inc. v. Piper, where the Court held that attorneys' fees were not recoverable because they were not included in the statutory definition of costs set forth in 28 U.S.C. § 1927. Id. (citing Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980)). The court also emphasized that § 1988 provides that attorneys' fees "*may*" be awarded as part of costs. Id. at 118. Therefore, the court concluded that § 1988's definition of costs should not be "superimposed" upon Rule 39's definition.

The Third Circuit's decision in McDonald is unpersuasive to the court. First, the basis of the McDonald court's reasoning is contrary to Ninth Circuit precedent regarding the interpretation of Rule 39. Azazian, 499 F.3d at 958. Second, because the Ninth Circuit has held that Rule 39 does not create a uniform definition of costs, this issue in this case is more akin to that before the Supreme Court in Marek, not in Roadway. Finally, the

court disagrees with the Third Circuit's emphasis on the term "may" in § 1988. The language of the statute provides that "the court, in its discretion, *may* allow the prevailing party, . . . a reasonable attorney's fee as part of the costs . . . ." 42 U.S.C. § 1988. A plain reading of the statute requires that "may" refers to the courts discretion to award attorneys' fees. However, it does not support an interpretation that the court may or may not consider attorneys' fees as part of the costs. Further, such an interpretation would be contrary to the Supreme Court's holding in Marek that Congress expressly included attorneys' fees as costs. 473 U.S. at 9.

Plaintiff also argues that costs should not be denied in this case because the Ninth Circuit granted transfer to this court pursuant to Ninth Circuit Rule 39-1.8, which provides that a party who is or may be eligible for fees may transfer consideration of fees on appeal to the district court. (Order [Docket #191], filed Dec. 14, 2007.) In essence, plaintiff contends that the Ninth Circuit's transfer order amounts to a determination that it should be awarded attorneys' fees. The court does not read the transfer order so broadly. Rather, the Ninth Circuit's order transferred the case for "consideration" of attorneys' fees on appeal. (Id.) Such consideration includes whether fees should be awarded at all. This is consistent with the language of Ninth Circuit Rule 39-1.8, which allows for a motion to transfer to be made by "[a]ny party who is or *may* be eligible for attorneys fees on appeal." Moreover, the Ninth Circuit's remand orders in this case are distinguishable from other orders where it has explicitly found that attorneys' fees

on appeal should be awarded pursuant to § 1988, even if other appeal costs are borne by each party. See Merritt v. Mackey, 932 F.2d 1317, 1325 (9th Cir. 1991) ("Each party will bear its own share of the regular costs on appeal. As prevailing party in this litigation, Merritt is entitled to an award of fees on appeal pursuant to 42 U.S.C. § 1988 . . . .")[8]; see also Am. Jewish Congress v. City of Beverly Hills, 90 F.3d 379, 386 (9th Cir. 1996) (granting the request for attorneys' fees on appeal pursuant to § 1988 and remanding to the district court for determination of the proper amount).

Therefore, because the court holds that the Ninth Circuit's remand orders directing that each party would bear its own costs on appeal includes attorneys' fees under § 1988, the court reduces the requested attorneys' fees to the extent they arise out of counsel's work on appeal. (See Appendix A, B.)[9]

C. Reductions for Limited Success

Where a plaintiff is deemed the prevailing party, even though he succeeded on only some of his claims for relief, the court must take into account the partial or limited success in

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[8] The court notes that nothing in its analysis would preclude the Ninth Circuit from exempting attorneys' fees from its orders regarding costs under Rule 39. In such a case, the court's explicit orders would define the term costs, and the court need not look to the underlying statute for its definition.

[9] Appendix A and B reflect only the hours and costs expended by plaintiff's lead counsel. The court has reviewed the hours and costs expended by plaintiff's local counsel. Sweeney did not incur any fees, costs, or expenses related to plaintiff's appeals. Ballard expended 1.4 hours related to plaintiff's appeal between March 1, 2005 and November 15, 2007. (Ex. A to Ballard Decl.) As such, the court does not award Ballard fees for these hours. Ballard did not incur any costs or expenses related to plaintiff's appeal.

awarding attorneys' fees. Hensley, 461 U.S. at 434-40 (1983); Gates, 987 F.2d at 1403-04. "A fee based on the hours expended on the litigation as a whole may be excessive if a plaintiff achieves only partial or limited success." Farrar v. Hobby, 506 U.S. 103, 104 (1992) If there are two distinctly different claims for relief based upon different facts or legal theories and the plaintiff prevails on only one of those claims, the plaintiff should not recover fees for work on the unsuccessful claim. Id. However, if plaintiff brings claims that involve a common core of facts or are based on related legal theories, the court cannot treat those claims as distinct and must "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Id. at 435.

When balancing the relief obtained against the hours expended, "[t]he result is what matters." Id.; see Gates, 987 F.2d at 1404. If a plaintiff obtained excellent results, the fee award should not be reduced simply because the plaintiff failed to prevail on every claim brought in the litigation. Id. Nor should the court necessarily reduce the lodestar because the prevailing party did not receive the type of relief it requested. Gates, 987 F.2d at 1404 (citations omitted). However, if a plaintiff obtained a result that was favorable, but only partially successful, full compensation for all the hours expended in litigation may be excessive. Hensley, 461 U.S. at 436. While there is not precise rule or formula for making these determinations, the Ninth Circuit has noted that the "favored procedure" is for the court to adjust attorneys' fees to take

into account limited success in the "initial determination of hours reasonably expended," and "not in subsequent adjustments to the lodestar figure." Gates, 987 F.2d at 1404 (citing Corder v. Gates, 947 F.2d 374, 378 (9th Cir. 1991); Cabrales v. County of Los Angeles, 864 F.2d 1454, 1464 (9th Cir. 1988)).

1. Issues Litigated Prior to the First Appeal

In the initial motions before the court and in its first appeal before the Ninth Circuit, plaintiff attacked the constitutionality of California's campaign finance disclosure laws on essentially two bases: (1) the definition of independent expenditure; and (2) the ability of California to regulate ballot-measure advocacy. See Getman, 328 F.3d 1088; see also Mem. & Order [Docket #95], filed Jan. 22, 2002. Plaintiff did not prevail on its claims arising out of the definition of independent expenditure. See Getman, 328 F.3d at 1096-1100. However, the Ninth Circuit found that while California may regulate ballot-measure advocacy, the State must also establish whether it has a compelling informational interest satisfying such disclosures. Id. at 1100-07.

Plaintiff concedes that the independent expenditure claims was a separate and distinct claim from the ballot advocacy claims that thus, it should not be awarded fees for work arising out of litigation of the independent expenditure claims. Plaintiff represents that approximately half of the time expended was spent on the independent expenditure claim and half of its opening brief on its first appeal was devoted to argument on the independent expenditure claim. (Bopp Decl. ¶ 28.) As such,

plaintiff requests fees for fifty percent of the hours worked on the litigation prior to the first appeal. (Id.)

The court has reviewed the underlying record, the declarations of counsel, and the relevant time/rate sheets submitted by plaintiff. The court finds that plaintiff's proposed reduction of fifty percent of the hours worked on the litigation prior to the first appeal is reasonable and supported by both the law and the facts. (See Appendix A.)

2. Issues Litigated Prior to the Second Appeal

After the Ninth Circuit's first remand order in 2003, the issues in this litigation were narrowed to (1) whether the California had a compelling informational interest in its laws relating to ballot-measure advocacy; and (2) whether the current regulations were narrowly tailored to that interest. Both of these issues were based upon the constitutionality of the laws addressing ballot-measure advocacy. As such, plaintiff's surviving claims were based on related legal theories, and the court cannot treat those claims as distinct; rather, it must "focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." Hensley, 461 U.S. at 435.

In its second remand order, the Ninth Circuit held that defendants had met their burden of demonstrating that California has a compelling interest in the disclosure of funding sources for express ballot measure advocacy; and that the definition of "contribution" is narrowly tailored to that compelling interest. Randolph, 507 F.3d at 1183-87. However, the Ninth Circuit held that the PRA's imposition of the "full panoply of regulations

that accompany status as a political committee under the Act," was not narrowly tailored. Id. at 1187-89. As such, the PRA's disclosure provisions were upheld, and the Ninth Circuit held that CPLC may be required to disclose contributions as defined by the PRA. Id. at 1189. However, CPLC is not required to comply with the additional political committee-like requirements set forth in the PRA. Id. at 1189-90.

The court finds that the results achieved by plaintiff as a result of its second appeal were excellent. While it may be required to disclose contributions, plaintiff obtained a permanent injunction against the state with respect to enforcement of the full-panoply of political-committee like requirements. See Hensley, 461 U.S. at 435 n.11. ("Nor is it necessarily significant that a prevailing plaintiff did not receive all the relief requested."). Therefore, the court does not reduce plaintiff's requested fees based upon partial or limited success obtained in the second appeal.[10]

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[10] Defendants assert that the court should discount attorneys' fees by a fraction, applying the same percentage of reduction to claims litigated prior to the first appeal as to those litigate prior to and after the second appeal. Specifically, defendants assert that at least ninety percent of the hours requested by plaintiff should not be compensated for because only ten percent of the briefs submitted to the Ninth Circuit on the second appeal were devoted to the issue on which plaintiff ultimately prevailed. However, the court finds that this methodology fails to take into account (1) the actual time spent on the distinct issue in the first appeal; (2) that plaintiff's claims litigated after the first appeal were based upon related legal theories; and (3) that plaintiff's ultimate result obtained after the second appeal was substantial. As such the court rejects the application of defendants' proposed methodology.

D. Exclusion of Hours

When evaluating a request for attorneys' fees, the court must exclude hours that it deems were not reasonably expended. Hensley, 461 U.S. at 434. The court has reviewed the hours submitted by plaintiff, and has excluded hours for work that it deems were excessive, redundant, or otherwise unnecessary. (See Appendix A, B.)

E. Costs

Pursuant to Local Rule 54-292(b), plaintiff had ten days after entry of judgment, on March 12, 2008, to request costs as the prevailing party. Plaintiff failed to do so. Rather, plaintiff included its request for costs in its motion for attorney fees, filed April 11, 2008. Plaintiff also included expenses in its itemized list for "costs."[11]

In light of the complex and on-going nature of the litigation, the court will consider plaintiff's belated requests for costs. Harris, 24 F.3d at 20 n.4 (noting that a party's failure to comply with the timely filing requirement set forth in the local rule "does not oust the district court's jurisdiction" to consider the belatedly filed request for costs). The court has reviewed plaintiff's requested costs and expenses, excluding those costs and expenses attributable to appeal as well as those that are unreasonable, unclear, or duplicative. (See Appendix A, B).

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[11] Defendant does not dispute that plaintiff can recover "as part of the award of attorney's fees those out-of-pocket expenses that 'would normally be charged to a fee paying client.'" Harris v. Marhoefer, 24 F.3d 16, 19 (9th Cir. 1994) (quoting Chalmers v. City of Los Angeles, 796 F.2d 1205, 1216 n.7).

CONCLUSION

For the foregoing reasons, and as set forth more fully in Appendix A and Appendix B, the court awards attorneys' fees and reasonable costs and expenses to plaintiff as follows:

(1) Bopp, Coleson & Bostrom: $ 530,059.19[12]

(2) The Ballard Law Practice: $ 12,652.95[13]

(3) Sweeney & Greene LLP: $ 7,312.50[14]

IT IS SO ORDERED.

DATED: September 30, 2008

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE

[12] This is the sum of the fees and expenses incurred during the litigation of the case, including the multiplier, ($431,674.12 x 1.15 = 496,425.23) and the fees and expenses incurred during the motion for attorneys' fees ($33,629.96).

[13] This is the sum of local counsel's fees for all hours except those relating to the appeal (50.5 hours x $250 per hour = $12,625) and expenses incurred ($27.95).

[14] See Ex. A to Sweeney Decl.